(1) Supreme Court, U.S.
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In The

Supreme Court of the United States

LOCAL 134 IBEW and MICHAEL FITZGERALD,

Petitioners.

v.

CHARLES CHATHAS, ED MCGUIRE, JIM HASTINGS, BERNIE HICKEY, JR. and BOB PITLOCK,

Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Circuit courts of appeals have disagreed on the interpretation of § 501 of the Labor Management Reporting and Disclosure Act (29 U.S.C. § 501) (LMRDA) and have not uniformly applied the statute to labor organizations. Some circuits have extended the application of § 501 beyond violations of trust and fiduciary responsibilities in relation to the money and property of the union to include questions of internal governance of a labor organization. The Seventh Circuit Court of Appeals has now gone far beyond any existing case law by including non-union activity and the solicitation of non-union funds within the definition of a potential violation of § 501.

The question presented is: Shall the Supreme Court resolve the conflict between the circuits' decisions interpreting the application of § 501?

PARTIES TO THE PROCEEDING

The Petitioners are Local 134 International Brotherhood of Electrical Workers (Chicago/Cook County) and its Business Manager/Financial Secretary, Michael Fitzgerald, who were two of the defendants in the district court proceedings.[1]

The Respondents, Charles Chathas, Ed McGuire, Jim Hastings, Bernie Hickey, Jr. and Bob Pitlock are five members of the 18,000 member Local 134 IBEW and were the plaintiffs below. Charles Chathas is a former officer of Local 134 whose internal union party has been defeated in two successive union elections.

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[1]Another defendant, the Unified Social Club, did not participate in this petition.

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PETITION FOR A WRIT OF CERTIORARI

Local 134, International Brotherhood of Electrical Workers and its Business Manager/Financial Secretary, Michael Fitzgerald, petition this Court for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Chathas, et al. v. Local 134 IBEW, et al.*, 233 F.3d 508 (7th Cir. 2000) and is reproduced in the Appendix to this Petition at App. A-1 - A-9.

The decision of the district court is not reported and is reproduced in the Appendix at App. A-10 - A-12.

The order of the Seventh Circuit Court of Appeals denying the petition for rehearing and petition for rehearing *en banc* is reproduced in the Appendix at App. A-13.

JURISDICTION

The Seventh Circuit Court of Appeals issued its written decision on October 18, 2000, and then issued a corrected decision on October 25, 2000. The Petitioners and another defendant submitted a petition for rehearing on November 1, 2000, which was denied on November 15, 2000.

This court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves conflicting judicial interpretations of § 501 of the Labor Management Reporting and Disclosure Act (LMRDA). The provisions of this section at issue here, concern the duty and fiduciary responsibility of labor union officials in dealing with money and property of the union.

Section 501 as applicable to this petition, provides, in part:

29 U.S.C. § 501 states:

> (a) Duties of Officers; exculpatory provisions and resolutions void
>
> The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve

any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) Violation of duties; action by member after refusal or failure by labor organization to commence proceedings; jurisdiction; leave of court; counsel fees and expenses

When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

STATEMENT OF THE CASE

On January 25, 1999 the Respondents filed a complaint against Local 134 International Brotherhood of Electrical Workers, its Business Manager/Financial Secretary, Michael Fitzgerald and the Unified Social Club, a social organization of electricians who are members of Local 134, to enjoin the union and its officers from soliciting and accepting employer contributions allegedly made in violation of § 302 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 186.[2]

On February 12, 1999 the trial court entered a preliminary injunction barring the Petitioners from soliciting or accepting any payments from employers of Local 134 members to the Unified Social Club pending further order of court.

Local 134, Fitzgerald and Unified subsequently moved the district court to enter an order converting the preliminary injunction into a permanent injunction and dismissing the case as moot.[3] On October 7, 1999, the trial court entered a permanent injunction and set a date for ruling on the Petitioners' motion to dismiss. Approximately nine months after the initial complaint was filed and after obtaining all of the relief requested in the original complaint, the Respondents asked for leave of court to add an additional count to their complaint

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[2]The complaint also asked for relief under 29 U.S.C. 185, the "Duty of Fair Representation Claim," which was dismissed and not appealed by the Respondents. This claim asked for the same relief later requested under the guise of a § 501 action.

[3]The Petitioners argued in the district court that since they were not violating the law, a permanent injunction would only prohibit activity they were not involved in, and as such, created no jeopardy to the Respondents.

claiming violations of 29 U.S.C. § 501. On November 23, 1999, the trial court entered an order granting the Petitioners' motion to dismiss and denying the Respondents' leave to file an amended complaint opining "that the solicitation of money from employers does not involve union funds or property, thus does not state a claim under 29 U.S.C. § 501.". A-12.

On appeal, the United States Court of Appeals for the Seventh Circuit found the permanent injunction was valid.[4] That ruling was not challenged and is no longer at issue.

The Seventh Circuit held that the district court incorrectly forbade the amendment on the sole ground that the claim sought to be added did not state a claim under § 501. In fact, the Seventh Circuit expanded § 501 and found that a claim was presented. The case was remanded to the district court judge to exercise his discretion as to whether the Respondents' proposed amendment was barred due to undue delay. On January 25, 2001, the district court allowed the Respondents leave to amend their complaint but again expressed its opinion that under § 501, the Respondents did not state a cause of action.

REASONS FOR GRANTING THE WRIT

The Supreme Court should grant certiorari to resolve the conflict between the circuits as to the extension and application of § 501 of the LMRDA. The intent and purpose of this section—to provide a remedy to union members when the union refuses to act against a union official who has violated his duties—has been differently

[4]The Respondents, who originally requested the permanent injunction, appealed the District Court's granting of that relief. App. A-1.

applied by the circuits that have addressed the scope of § 501. The decisions of the courts of appeals and lower courts run the gamut from a strict reading of § 501 to the new interpretation which includes the finding that non-union activity by social club members selling tickets and ads for a social dance, unrelated to union business, also states a claim under which relief can be granted. The broad brush of appellate interpretation has extended the application of § 501 to include non-union funds, property and interests.

This case asks the Supreme Court to speak to the meaning, intent, purpose and construction of § 501 and bring the circuits together in order to allow uniform and equal application and one set of rules for union officials across America.

I. The Inconsistent Application of § 501 of the Labor Management Reporting and Disclosure Act Affects Millions of American Workers

One of the principal reasons for granting certiorari is to resolve conflicting decisions of the courts of appeals. *Braxton v. United States,* 500 U.S. 344, 347 (1991). This Court has, on a host of occasions, granted certiorari to resolve conflicts among the circuits involving labor issues. *National Labor Relations Board v. Savair Mfg. Co.,* 414 U.S. 270 (1973); *International Union v. Scholefield, et al.,* 382 U.S. 205 (1965); *Calhoon, etc. v. Harvey, et al.,* 379 U.S. 134 (1964); *National Labor Relations Board v. Wooster Division of Borg Warner Corp.,* 356 U.S. 342 (1957).

The importance of the LMRDA to the nation's overall labor policy is beyond dispute. At § 401 of the LMRDA (20 U.S.C. § 401) Congress found that it is in the public interest and the responsibility of the Federal Government

to protect the rights of the millions of workers who have a dramatic effect on the country's economy. According to the Bureau of Labor Statistics, over sixteen million people belonged to American unions in 2000. Decisions interpreting federal labor laws affect not only those union members, but their families as well as the overall economy and social structure of the American people.

As explained below, the conflicting decisions of the circuits create a legal morass for union officers whose activities are governed, not by a uniform national standard, but by a hodgepodge of differing interpretations. Consequently, the propriety of union officials' conduct turns principally on where the conduct occurred and which circuit is hearing the appeal.

Moreover, the abbreviated decision of the Seventh Circuit Court of Appeals at issue here, adopts a broader interpretation of § 501 then has been allowed in any other circuit. This decision warrants reversal because it is not in accord with the congressional intent surrounding the adoption of § 501. In view of the myriad of remedies available to discontented union members who wish to challenge perceived wrongs suffered at the hands of union officials, an expanded application of § 501 serves no useful purpose. It is almost impossible to conceive of a factual situation where a union member, alleging an action based on a broad interpretation of § 501, would not be able to seek redress by filing an unfair labor practice charge with the National Labor Relations Board under § 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A) (which the Respondents attempted herein); or filing a lawsuit for breach of duty of fair representation under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (which the Respondents did before the district court); or filing a lawsuit for

breach of the union's constitution and by-laws under § 301 of the LMRDA; or instituting an action under Title I of the LMRDA, 29 U.S.C. § 411, *et seq.*, alleging a violation of the union members' bill of rights; or initiating a complaint with the Department of Labor for violation of the election provisions of Title IV of the LMRDA, 29 U.S.C. § 481, *et seq.* (which the Respondents did in this case). In view of this plethora of remedies, a broad application of § 501(a) is not only unwarranted by the language of the provision, but completely unnecessary as well.

II. The Circuits are Divided as to the Interpretation of § 501

The one common theme in § 501 cases is that official union business is always in question. The differences in the circuit opinions revolve around the misuse or misappropriation of funds and property of the union versus union mismanagement or procedurally depriving members of election lists, appropriate contracts or votes on items in the constitution, or other similar union business activities.

No case, in any of the circuits, have allowed a § 501 action under any theory as remote as the Respondents offer here. The Respondents contend that a social club, comprised of some union members, selling tickets and ads for an ad book to an annual Valentine's Day dance violates § 501 because a few union officials allegedly sold tickets and ads to contractors who employ Local 134 members.

There is a sharp division amongst the appellate circuits as to the scope of § 501. Both the Second and Seventh Circuits have adopted a literal interpretation of the statute applying it only to conduct involving union

funds or property. Other circuits, however, have gone beyond the statutory language and do not confine violations of the statute to the mishandling or misappropriation of money and property of the union by union officials.

A. The Second Circuit Applies § 501 Only to Conduct Involving the Funds or Property of a Union

The Second Circuit has expressly adopted the view that the fiduciary duties imposed by § 501 relate solely to conduct involving the handling of money or property of the labor organization. In *Gurton v. Arons,* 339 F.2d 371 (2d. Cir. 1964), the court stated:

> A simple reading of [§ 501] shows that it applies to fiduciary responsibility with respect to the money and property of the union and that it is not a catch-all provision under which union officials can be sued on any ground of misconduct with which the plaintiffs choose to charge them." *Id.* at 375.

Further, the *Gurton* court stated that the provisions of the LMRDA were not intended by Congress to constitute an invitation to the courts to intervene at will in the internal affairs of unions. The Second Circuit held that courts have no special expertise in the operation of unions which would justify a broad power to interfere. *Id.* at 375. The court commented that most unions were honestly and efficiently administered, and that general supervision by the courts would not contribute to the betterment of the unions or their members or to the cause of labor-management relations. *Id.*

Similarly, in *Coleman v. Brotherhood of Railway & Steamship Clerks,* 340 F.2d 206 (2d. Cir. 1965), the Second Circuit stated:

> The charges of the plaintiff refer to the voting on Resolution No. 611 and not to the mishandling of any money or property of the Union. The complaint is that the membership was not given all the information it needed for voting intelligently and that the Resolution was rushed through the convention. There are also allegations that [defendant's] conduct fell short of that required of him. These claims fail to allege anything which would constitute a violation of Title V." *Id.* at 209.

The Second Circuit further found that the union officials did not violate their fiduciary obligation under § 501 by inducing plaintiffs to participate in a strike in *Yanity v. Benware,* 376 F.2d 197 (2d. Cir. 1967), citing *Gurton v. Arons.* In *Head v. Brotherhood of Railway, Airline and Steamship Clerks, etc.,* 512 F.2d 398 (2d Cir. 1975), the court reviewed its interpretation in *Gurton* and adhered to its earlier view that the sole function of § 501 centers on the mishandling of union funds.

In *Morrissey v. Curran,* 650 F.2d 1267 (2d. Cir. 1981), the court noted "We have recognized, as have many other courts, that the Act does not give courts a license to interfere broadly in internal union affairs." *Id.* at 1274. In that case the court held that where a union officer personally benefits from union funds, a court in a § 501(b) suit may determine whether the payment, notwithstanding its authorization, is so manifestly unreasonable as to evidence a breach of the fiduciary obligation imposed by § 501(a). *Id.* at 1275.

B. The Seventh Circuit Has Previously Followed the Second Circuit

The Seventh Circuit, like the Second Circuit, limited its findings of a breach of fiduciary duty under § 501 to situations involving union funds or property. In *Hood v. Journeyman Barbers,* 454 F.2d 1347 (7th Cir. 1972), the court noted that § 501 had been enacted in response to the "mischief" which had been exposed by the investigating committee chaired by Senator McClellan. According to the court:

> "That mischief was the misuse of union funds and property by union officials in its every manifestation." *Id.* at 1352.

In *Lux v. Blackman,* 546 F.2d 713 (7th Cir. 1976), the Seventh Circuit indicated that it believed limiting § 501 to matters involving misuse of union money and property was appropriate. The court upheld the dismissal of plaintiffs' claim that the defendant union president had violated his fiduciary duty under § 501 by discharging plaintiffs from their union positions because of their communist affiliation. The court noted that in deciding the issue it was not necessary "to explore the full reach of § 501." *Id.* at 718. However, citing the Second Circuit's decision in *Gurton,* the court stated that it was "convinced that the provision had no application to the facts of this case." *Id.* at 744.

Later, in *Trustees of the Operative Plasterers' and Cement Masons' Local Union v. Journeyman Plasterers' Protective and Benevolent Society, Local Union No. 5,* 794 F.2d 1217 (7th Cir. 1986), the Seventh Circuit acknowledged that the Second Circuit interpreted § 501 to encompass only breaches of fiduciary duty grounded in alleged misappropriation of money or property, while

other circuits had adopted a more expansive view of the scope of § 501 and have viewed it as a "weapon to correct abuses in the union's internal process of governance." *Id.* at 1220. The court recognized that the Seventh Circuit had not definitively decided the scope of § 501, stating "to date, this circuit has not described, except in the most tentative and fact-specific way, the contours of this section." *Id.* at 1221. However, it noted that in *Lux* "we seemingly adopted the *Gurton* approach . . ." 794 F.2d at 1221, and went on to observe that "the primary target of the Act's fiduciary duty provision was . . . the union official charged with the management of the membership's assets." *Id.*

In *Shepherd v. AT&T,* 1994 WL 186080 (N.D.Ill.), the court recognized that in *Lux,* "the Seventh Circuit apparently adopted the narrow position of the Second Circuit." *Id.* at 3. Furthermore, it stated, "the purpose of § 501 was to protect the interests of the union by preventing financial mismanagement of union property by union officials . . . A plain reading of the statute indicates that it is limited to breaches of fiduciary duty involving the money or property of the union." *Id.* at 2.

Despite this precedent, in the instant case the Seventh Circuit summarily concluded that, "Although § 501 is primarily aimed at preventing officers from misusing union funds, it is not limited to that conduct." *Chathas, et al. v. Local 134, et al.*, App. A-8. The opinion did not explain why the circuit was adopting this more expansive view, nor why the prior Seventh Circuit decisions did not apply to this case. Other circuits have, however, adopted the "expansion" of § 501.

C. The Eighth Circuit Expands Liability Under § 501 to Include Official Union Activities Beyond Being a Fiduciary For Funds and Property

The courts which espouse a broader interpretation have applied § 501 in a variety of circumstances. However, in every case, a union decision, union money or union conduct is involved. In this case, none of those factors exist—only selling tickets and ads to a Valentine's Day dance.

The Eighth Circuit chose to interpret § 501 to impose fiduciary responsibility in its broadest application, finding that the section is not confined in its scope to union officials in their handling of money and property affairs in *Johnson v. Nelson,* 325 F.2d 646 (8th Cir. 1963). The court held that the defendant officers' refusal to pay certain attorneys' fees and related expenses as duly authorized by a majority vote of the local members constituted a violation of their fiduciary responsibilities within the meaning of the Act. Although extending the plain language of § 501, the court was still concerned with union business and the anticipated expenditure of union funds.

In *Pignotti v. Local 3 Sheetmetal Workers,* 477 F.2d 825 (8th Cir. 1973), cert. den. 414 U.S. 1067 (1973), the court reexamined its holding of *Johnson v. Nelson, supra.* The court reviewed the legislative history of the LMRDA and stated "the broader view of fiduciaries' responsibilities is correct, based on Congressional intent and the explicit language of § 501(a)." *Id.* at 835. The *Pignotti* court held that § 501 applied to an action brought by union members complaining that union officials had improperly sought to have the local union participate in a national pension plan despite the fact that participation

had been rejected by a majority vote of the local's membership.

D. The Ninth Circuit Abandoned the Second Circuit's Opinion in Favor of the Eighth Circuit's Position

The Ninth Circuit first appeared to follow the Second Circuit *Gurton* decision in *Phillips v. Osborne,* 403 F.2d 826 (9th Cir. 1968), stating:

> It has been recognized that the broad language of § 501(a), imposing fiduciary duties upon union officers, potentially invites undue government interference. Hence, when dealing with this section the courts have been especially careful to confine their role to areas which are clearly within the intended reach of the Act. For example, in *Gurton v. Arons,* 339 F.2d 371 (2d Cir. 1964), the court refused to extend federal jurisdiction under § 501 to breaches of fiduciary duties involving activities unrelated to the money or property of the union. It was declared that fiduciary responsibility under the Act 'is not a catch-all provision under which union officials can be sued on any ground of misconduct with which the plaintiffs choose to charge them.' 339 F.2d at 375.

However, a number of years later, it then recognized the diverse opinions as to the scope of § 501 in *Kerr v. Shanks,* 466 F.2d 1271 (9th Cir. 1972), stating:

> The position of the court in *Johnson v. Nelson* that § 501 is not limited to breaches of trust directly involving officers' handling of union money or property has been termed the 'major-

> ity' view. *Cefalo v. Moffett,* 1971 [146 U.S.App.D.C. 117], 449 F.2d 1193, 1198 n. 15. The question remains open in this circuit. Our citation of *Gurton v. Arons, supra,* in *Phillips v. Osborne,* (9 Cir. 1968), 403 F.2d 826, 830, does not commit us to follow Gurton. We cited Gurton as merely illustrative of a point of view." *Id.* at 1275 n.2.

The Ninth Circuit again recognized the division between circuits in *Stelling v. IBEW Local 1547,* 587 F.2d 1379 (9th Cir. 1978), cert. den., *Darby v. IBEW,* 442 U.S. 994 (1979), reh. den. 444 U.S. 889 (1979), stating:

> Most courts have taken the 'broad view' of § 501 and interpreted it as establishing the fiduciary duties of labor organization officers in all their functions. However, a minority of courts have found that 501 was confined to controversies involving fiduciary responsibilities related only to the 'money and property' of the unions. *Id.* at 1386. (Internal citations omitted).

The *Stelling* court then chose to follow the more expansive view of the statute, stating, "section 501 establishes that union officials have fiduciary duties even when no monetary interest of the union is involved." *Id.* at 1386. The court held that § 501 conferred jurisdiction in an action by union members alleging that the local union and international had violated the union's constitution by failing to submit a collective bargaining agreement to the membership for a ratification vote.[5]

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[5]Like all previous decisions, this case involved official union activity within the union itself.

The Ninth Circuit reaffirmed its adoption of the broader view of the statute in *Lodge 1380, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC) v. Dennis,* 625 F.2d 819 (9th Cir. 1980), stating that on the basis of the *Stelling* decision, the plaintiff's allegation that the defendant wrongfully refused to give the local access to the mailing list of all the union members and his refusal to hold a referendum called for by the constitution of the union, did state a breach of fiduciary duty within LMRDA § 501. *Id.* at 828-29.[6]

E. The Third Circuit and Courts Within the Fourth and Sixth Circuits Have Adopted the More Expansive Eighth Circuit Approach

The Third Circuit also examined the legislative history of § 501 in the case of *Sabolsky v. Budzanoski,* 457 F.2d 1445 (3rd Cir. 1972). The Circuit noted that in *Johnson v. Nelson,* 325 F.2d 646 (8th Cir. 1963), the Eighth Circuit "made a thorough analysis of the legislative history of the LMRDA, and concluded that § 501 imposes fiduciary responsibility in its broadest application and is not confined in its scope to union officials only in their handling of money and property affairs." The Third Circuit chose to adopt this broad interpretation of § 501 and stated "to the extent that *Gurton v. Arons,* 339 F.2d 371 (2d Cir. 1964), relied on by the court below over-emphasizes the danger of judicial intervention in union affairs, we decline to follow it." *Sabolsky* at 1251. In *Sablosky,* union members sought to compel union officials to comply with a constitutional requirement to disband locals of less than ten working members, and the court

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[6]Once again, although not directly involving funds or property, the action related to official union activity.

found that the union members stated a claim under § 501.[7]

In *Richardson v. National Post Office Mail Handlers,* 442 F.Supp. 193 (E.D. VA 1977), the court acknowledged the split in authority among the circuits, stating, "Although the Fourth Circuit has not ruled on the scope of § 501, those few circuits which have are not in harmony with one another." *Id.* at 194. The *Richardson* Court weighed both views of the statute carefully and adopted the broader interpretation, stating, "the expansive language of § 501(a) simply isn't consonant with a narrow reading of its intended protection to union members." *Id.* at 195. The court found that the plaintiffs' allegations citing union officials for violation of the union constitution and failure "to provide information to the membership upon matters which members must decide, such as elections, dues increases, mergers and constitutional changes, . . ." stated a § 501 cause of action. *Id.* at 193.

In another lower court Fourth Circuit case, *Bauman v. Bish,* 571 F.Supp. 1054 (N.D. W.Va. 1983), the plaintiff alleged that the union president breached a fiduciary duty of trust under § 501 by failing to disclose information which is essential to decisions other union members must make. The court stated, '[m]ost courts that have considered the question have interpreted § 501 as establishing fiduciary duties of labor organization officers in all their functions, and not just limited to financially-related fiduciary duties. For purposes of this summary judgment motion, this Court is willing to adopt

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[7]Even the expansive interpretation of § 501 requires the involvement of official union business.

such an expansive view of § 501." *Id.* at 1062. (Internal citations omitted).[8]

In *Wade v. Teamsters Local 247*, 527 F.Supp. 1169 (E.D. MI 1981), a case within the Sixth Circuit, the court found the plaintiff's claim that defendant union officers had violated the union constitution by failing to hold monthly membership meetings to discuss and decide union business was actionable under § 501.[9]

CONCLUSION

The common theme throughout the divergent opinions of the seven circuits cited, include some official action, or inaction, by union officials, involving union business, which results in some type of breach of a fiduciary relationship or trust. The difference lies in the type of fiduciary breach; the circuits are divided between those that limit a breach of § 501 to misappropriation of union money and property and the others allowing an action to proceed if any other official union business is involved.

The summary decision of the Seventh Circuit included the social activity of union officials under the penumbra of § 501, thereby extending § 501 beyond any of the prior decisions of the other circuits. The Seventh Circuit, in a few sentences, found union officials potentially guilty of violating § 501 for selling tickets to

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[8]Thus, the Fourth Circuit courts also take the expansive view of § 501 but maintain the bench mark of official union duties and functions being violated, before a claim is sufficiently plead.

[9]This Circuit also finds actionable a violation of internal union policy.

a non-union social event that had nothing to do with official union business.

The circuits are split on this vital issue to union members and union officials throughout the United States.

The Petitioners respectfully suggest the Supreme Court exercise its jurisdiction and grant this Petition for Writ of Certiorari.

Respectfully submitted,

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Michael Fitzgerald

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-4314

Charles Chathas, et al.,
Plaintiffs-Appellants,

v.

Local 134 IBEW, Unified Social Club,
and Mike Fitzgerald,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 99 C 0400—James B. Zagel, Judge.

Argued May 30, 2000
Decided October 18, 2000

Before Posner, Coffey, and Kanne, *Circuit Judges.*

Posner, *Circuit Judge.* This appeal presents a tangle of jurisdictional, equitable, and labor-law issues. The plaintiffs are members of a local of the electricians union who are on the outs with the local's current business manager (that is, president), Mike Fitzgerald. They brought this suit under section 302 of the Taft-Hartley Act, 29 U.S.C. sec. 186, which forbids union officers to solicit employer contributions, against the local, Fitzgerald, and the "Unified Social Club," a social organization of members of the local. The suit charges that Fitzgerald solicited and received tens of thousands of dollars in contributions to the Club from employers with which the local bargains, the purpose being to solidify Fitzgerald's hold over the union by enabling the Club to provide attractive social outings for union members. Fitzgerald

created the Unified Social Club, and it is closely identified with him and his faction of the local. The more lavish its outings, the more likely he is to be reelected business manager.

The plaintiffs moved for a preliminary injunction forbidding the defendants to solicit or receive contributions to the Unified Social Club from employers doing business with the local. In September, the defendants submitted an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure. The essence of the offer was that the preliminary injunction would be made permanent, but that the offer was not to be construed as an admission of liability. Rule 68 offers are much more common in money cases than in equity cases, but nothing in the rule forbids its use in the latter type of case. *Liberty Mutual Ins. Co. v. EEOC*, 691 F.2d 438, 439-40 (9th Cir. 1982) (a case much like this); *People v. Operation Rescue National*, 80 F.3d 64, 68 (2d Cir. 1996); *Goodheart Clothing Co. v. Laura Goodman Enterprises, Inc.*, 962 F.2d 268, 270-71 (2d Cir. 1992); *Spencer v. General Electric Co.*, 894 F.2d 651, 655 and n. 5 (4th Cir. 1990), overruled on other grounds, *Farrar v. Hobby*, 506 U.S. 103 (1992); *RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 780-81 (8th Cir. 1988).

The plaintiffs rejected the offer. The defendants—not the plaintiffs—then moved the district court to enter a permanent injunction. The court did so, whereupon the defendants moved the court to dismiss the suit as moot. The plaintiffs objected, arguing that they were entitled to a declaratory judgment or at least to a finding in or accompanying the permanent injunction that the defendants had violated the law. At the same time the plaintiffs asked for leave to amend their complaint to add a claim under section 502 of the Labor-Management Reporting

and Disclosure Act, 29 U.S.C. sec. 501, which (in subsection a) imposes on an officer of the union, so far as bears on this case, a duty "to refrain from dealing with [the union] as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization." The relief sought was disgorgement of the moneys that the Unified Social Club had received from employers doing business with the local.

The district judge granted the motion to dismiss the suit as moot on the ground that the entry of the permanent injunction had eliminated the controversy between the parties, except insofar as the request to amend the complaint was concerned. That request the district court denied on the ground that "the solicitation of money from employers does not involve union funds or property, thus does not state a claim under 29 U.S.C. sec. 501."

The plaintiffs appeal, renewing the arguments that the district court rejected when it dismissed the suit. The appeal from the denial of declaratory relief (whether in the form of a declaratory judgment, or merely a judicial finding that the defendants did indeed violate section 302 of the Taft-Hartley Act) is independent of their appeal from the judge's refusal to let them amend the complaint to add a claim under section 501 of the Labor-Management Reporting and Disclosure Act, and it will promote clarity to treat them as if they were two separate appeals.

A winning party cannot appeal merely because the court that gave him his victory did not say things that he would have liked to hear, such as that his opponent is a lawbreaker. Adverse dicta are not appealable rulings. *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam); *United States v. Accra Pac, Inc.*, 173 F.3d 630,

632-33 (7th Cir. 1999); *Grinnell Mutual Reinsurance Co. v. Reinke*, 43 F.3d 1152, 1154 (7th Cir. 1995); *Atlantic Mutual Ins. Co. v. Northwest Airlines, Inc.*, 24 F.3d 958, 961 (7th Cir. 1994); *Abbs v. Sullivan*, 963 F.2d 918, 924 (7th Cir. 1992). They can cause harm, but not the sort of harm that the courts, in an effort to limit litigation, deem to create a genuine controversy within the meaning of Article III of the Constitution. Judgments are appealable; opinions are not.

Nor can a party force his opponent to confess to having violated the law, as it is always open to a defendant to default and suffer judgment to be entered against him without his admitting anything—if he wants, without even appearing in the case. *Reynolds v. Roberts*, 202 F.3d 1303, 1315 (11th Cir. 2000). And if the defendant has thus thrown in the towel there is nothing left for the district court to do except enter judgment. The absence of a controversy (in the constitutional sense) precludes the court from issuing an opinion on whether the defendant actually violated the law. Such an opinion would be merely an advisory opinion, having no tangible, demonstrable consequence, and is prohibited. *Alliance To End Repression v. City of Chicago*, 820 F.2d 873, 875-76 (7th Cir. 1987).

The plaintiffs acknowledge that their principal dissatisfaction with the permanent injunction that the district court entered is the absence of a finding of illegality, which they wish to brandish in their continuing struggle with Fitzgerald and his clique for control of Local 134. Had the injunction that the judge entered been narrower than the plaintiffs wanted, they could have appealed just like any other plaintiff who obtains only partial relief in the trial court and is dissatisfied. See, e.g., *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332-33 (1980);

EEOC v. Chicago Club, 86 F.3d 1423, 1431 (7th Cir. 1996); see also *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939) (appeal by prevailing defendant); *LaBuhn v. Bulkmatic Transport Co.*, 865 F.2d 119, 121-22 (7th Cir. 1988) (ditto). The plaintiffs drafted the preliminary injunction that the judge entered, however, and so far as the terms of the permanent injunction are concerned all the plaintiffs wanted was for him to make the preliminary injunction permanent, and he did so. The permanent injunction forbids exactly what the plaintiffs want it to forbid. But they argue that it is invalid because of its lack of a finding that the defendants violated the law, and if this is right it means that the relief they obtained was illusory—a proper basis for a "winning" plaintiff to appeal.

The requirements for a valid injunction are found in Rule 65(d) of the Federal Rules of Civil Procedure, which provides, so far as pertinent here, that "every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." The order granting the injunction in this case does not contain the material required by the rule; all it says is that the court grants the defendants' motion to enter a permanent injunction. The order contains no reasons and no terms, and in conspicuous contradiction of the rule incorporates by reference another document, namely the preliminary injunction. The order, in short, is a clear violation of Rule 65(d), *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 74-76 (1967); *Schmidt v. Lessard*, 414 U.S. 473 (1974) (per curiam); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 619-20 (7th Cir. 1998), but

also a harmless one, and it does not render the injunction unenforceable and so the plaintiffs have no legal basis for complaining. When the terms of an injunction, although not set forth in a separate document as the rule requires, can be inferred from the documentary record with sufficient clarity to enable a violation of those terms to be punished as a contempt, the injunction is enforceable. *Metzl v. Leininger*, 57 F.3d 618, 619 (7th Cir. 1995); *Chicago & North Western Transportation Co. v. Railway Labor Executives' Ass'n*, 908 F.2d 144, 149-50 (7th Cir. 1990). That is the case here. The preliminary injunction that the judge had entered in February of last year complied with Rule 65(d); the defendants' motion which the judge granted asked him to make the preliminary injunction permanent; and so the granting of the motion was the equivalent of reissuing the preliminary injunction but striking through the word "preliminary," just as in *Chicago & North Western Transportation Co. v. Railway Labor Executives' Ass'n, supra*, 908 F.2d at 150; see also *Advent Electronics, Inc. v. Buckman*, 112 F.3d 267, 273 (7th Cir. 1997).

Well, almost the equivalent; so far as the legal basis for the permanent injunction is concerned, the plaintiffs point out that the order entering the preliminary injunction recited only that "the Plaintiffs have made a reasonable showing of likely success on the merits," whereas the predicate for a permanent injunction would have to be that they had prevailed on the merits. A preliminary injunction is intended to protect the status quo while the case proceeds, not to adjudicate the merits. A plaintiff cannot obtain a permanent injunction merely on a showing that he is likely to win when and if the merits are adjudicated. *University of Texas v. Camenisch*, 451 U.S. 390, 394-95 (1981); *Plummer v. American Insti-*

tute of Certified Public Accountants, 97 F.3d 220, 229 (7th Cir. 1996); *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 915 (1st Cir. 1989).

True; and this is another example of the sloppy way in which the case was handled in the district court. But it is not true that a permanent injunction is invalid unless it recites that the defendants violated the law. The obvious counterexample is a permanent injunction entered pursuant to a consent agreement in which the defendants deny liability. See, e.g., *United States v. Accra Pac, Inc., supra*, 73 F.3d at 631. In such a case there is no adjudication of the merits, yet the injunction is valid. The plaintiffs in this case did not consent to the entry of the permanent injunction, because it was unaccompanied by a finding of liability. But that does not mean that the injunction was invalid, as would be obvious if the injunction had been entered after the defendants defaulted, as in *SEC v. Worthen*, 98 F.3d 480, 481 (9th Cir. 1996). Although Rule 65(d) does require that the order granting the injunction "set forth the reasons for its issuance," they need not take the form of findings that the defendant violated the law. The reason for the injunction might simply be that the defendant had consented to its entry—that in fact was the reason the judge gave when he dismissed the suit. He gave a reason, too, why the plaintiffs' objection should not be controlling. He said that the plaintiffs had got all they were entitled to, and he was right, given that the injunction is valid and prohibits exactly the same conduct that the plaintiffs wanted it to prohibit. All that is missing is a finding of violation, and we have seen that this is not a prerequisite to the issuance of a valid injunction.

Let us move now to what we're calling the second appeal. In defending the judge's refusal to allow the

plaintiffs to amend their complaint to add a claim under section 501 of the LMRDA Act, the defendants emphasize that the motion was made long after the case was filed. The complaint was filed in January of 1999; the amendment was not sought until November. But the delay cannot be dispositive, and for two reasons. First, the reason the plaintiffs delayed was to give the local a chance to sue the Club and its officers. A suit under section 501 by union members is a derivative suit. See, e.g., *O'Hara v. Teamsters*, 151 F.3d 1152, 1161 (9th Cir. 1998); *Weaver v. United Mine Workers*, 492 F.2d 580, 582 (D.C. Cir. 1973) (per curiam). The officers have defrauded the union, and only if the union (for example because controlled by the dishonest officers) refuses to bring suit are the members permitted to do so. So the plaintiffs had to give the union a chance to decide whether to sue (of course it decided not to). Second, the question whether to bar an amendment to the complaint because of undue delay is committed to the discretion of the district court, *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1430 (7th Cir. 1993); *Clemmons v. Delo*, 177 F.3d 680, 686 (8th Cir. 1999), and the court here did not exercise any discretion. It forbade the amendment on the sole ground that the claim sought to be added did not state a claim. If the judge was wrong in this legal ruling, the case must be returned to him for an exercise of his discretion.

We think he was wrong. Although section 501 is primarily aimed at preventing officers from misusing union funds, Tile, Etc., *Int'l Union v. Local 25*, 972 F.2d 738, 744 (7th Cir. 1992); *Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 654, 666 (7th Cir. 1992); *Hood v. Journeymen Barbers, Etc.*, 454 F.2d 1347, 1354 (7th Cir. 1972); *United States v. Hartsel*, 199 F.3d 812, 819

(6th Cir. 1999); *Morrissey v. Curran*, 650 F.2d 1267, 1274 (2d Cir. 1981), it is not limited to that conduct. The language we quoted earlier forbids the officers to deal with the union as an adverse party, which the defendants are accused of having done here by taking money from employers in order to solidify their control of the union. The statute also forbids union officers to obtain a personal interest adverse to the union, which the defendants did here by operating the Unified Social Club with funds from employers, thus creating a conflict between their interest in reelection and their duty to deal with employers at arm's length. Such conduct violates section 501 too. *United States v. Pecora*, 798 F.2d 614, 623 (3d Cir. 1986); *United States v. Cody*, 722 F.2d 1052, 1057 (2d Cir. 1983); *Johnson v. Nelson*, 325 F.2d 646, 650-53 (8th Cir. 1963). It was therefore error for the district judge to disallow the amendment on the ground he did, and the case must be remanded to enable him to make the required discretionary judgment.

Affirmed in Part, Reversed
in Part, and Remanded.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

No. 99 C 400

Charles Chathas, et al.,
Plaintiffs-Appellants,

v.

Local 134 IBEW, et al.,
Defendants-Appellees.

James B. Zagel, Judge.

November 23, 1999

Defendants consented to the entry of a permanent injunction, enjoining them from soliciting or accepting any payments from employers of Local 134 to members of the Unified Social Club. I entered the permanent injunction and Defendants now move to dismiss the case as moot. Plaintiffs respond by arguing that the case is still a justiciable controversy by virtue of their request for a declaratory judgment. Plaintiffs also request leave to file an amended complaint alleging a breach of fiduciary duty under 29 U.S.C. § 501.

As a preliminary matter, I note that by requesting the permanent injunction, the Defendants waive an entry of findings of fact and conclusions of law against them. The permanent injunction is thus analogous to a consent decree where defendants do not admit wrongdoing but submit to the court's authority and contempt power to regulate their business affairs.

Plaintiffs are not satisfied with this result and demand a declaration, pursuant to 28 U.S.C. § 2201, that Defendants violated Section 302 of the LMRA, 29 U.S.C. § 186. I may grant a declaratory judgment only "in a case

of actual controversy." 28 U.S.C. § 2201; *see also* U.S. Const. Art. III § 2. While a case or controversy may have existed at the time Plaintiffs filed the complaint, I must determine whether one exists now. *Golden v. Zwickler*, 394 U.S. 103, 108, 89 S.Ct. 956, 959 (1969). A declaratory judgment action becomes moot when the dispute between the parties "no longer rages." *Holstein v. City of Chicago*, 29 F.3d 1145, 1147 (7th Cir. 1994) (defendant's offer to give plaintiff all damages due him mooted declaratory judgment). Similarly, where a defendant voluntarily refrains from the alleged unlawful conduct, a declaratory judgment action is moot. *Nieves v. Oswald*, 498 F.2d 802 (2nd Cir. 1974). If, however, the challenged conduct is likely to recur, then a case or controversy may still exist. *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 94 S.Ct. 1694 (1974); *United States ex rel. Fitzgerald v. Jordan*, 747 F.2d 1118 (7th Cir. 1984). In this case, Defendants are permanently enjoined from committing the alleged unlawful acts and face contempt proceedings if they repeat the solicitation practices subject to the injunction. The conduct is therefore unlikely to recur and the dispute no longer rages. There is no case or controversy over which I have jurisdiction.[1]

Even if a case or controversy exists, I decline to exercise jurisdiction over this action. *See Wilton v. Seven Falls Company*, 515 U.S. 277, 286, 115 S.Ct. 2137, 2142 (1995) ("[s]ince its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants"). I find that the permanent injunction is a more effective and appropriate remedy.

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[1]Since I dismissed Plaintiffs' "duty of fair representation" claim, only the cause of action for declaratory and injunctive relief is pending.

The LMRA is expressly designed to enjoin the conduct at issue here, and I do not find that a declaration of rights would further the Act's purposes. The power of the contempt sanction will more effectively curb future abuses by the Union than will a declaration of past wrongdoing.

Finally, I deny Plaintiffs' leave to file an amended complaint. The solicitation of money from employers does not involve union funds or property, thus does not state a claim under 29 U.S.C. § 501. *Shepherd v. AT&T*, 1994 WL 186080 (N.D.Ill. 1994).

Defendants' motion to dismiss is granted. Plaintiffs' motion for leave to file an amended complaint is denied.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 15, 2000

Before

Hon. Richard A. Posner, *Circuit Judge*

Hon. John L. Coffey, *Circuit Judge*

Hon. Michael S. Kanne, *Circuit Judge*

No. 99-4314

CHARLES CHATHAS, ED MCGUIRE,
JIM HASTINGS, et al.,
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v.

LOCAL 134 INTERNATIONAL
BROTHERHOOD OF ELECTRICAL
WORKERS, UNIFIED SOCIAL CLUB,
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James B. Zagel, *Judge.*

ORDER

On November 1, 2000 defendants-appellees filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore **DENIED**.